



# Missives for New-build Houses (Scotland) Bill

Public Consultation Document

by

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## 1. FOREWORD

Scotland in recent times has seen a massive increase in the numbers of new-build homes being constructed each year and indeed my own constituency of Dunfermline East is home to many new housing estates. The rapid increase of this type of development has raised a number of new-build home purchase issues which are relevant to both the construction industry and home buyers. During my time as a member of The Scottish Parliament, one of the main issues raised by many of my constituents is the difficulties buyers face when their properties are not ready for entry within the agreed timescale.

This issue was first brought to the attention of the Scottish Parliament through a Public Petition<sup>1</sup> in 2001. The Scottish Executive Task Group Report on Housing in Scotland<sup>2</sup> acknowledged that the issue should be tackled. However, despite the best efforts and hard work of a number of professional bodies, entry dates given by developers to the buyers of the new-build homes are still not honoured, causing thousands of families considerable expense and inconvenience. Through this proposal, I hope to provide a vehicle for the Parliament to take action to ease the difficulties being faced by many people in Scotland when purchasing new-build homes.

My bill will require developers to give specific and realistic entry dates to purchasers of new-build homes.

I sincerely hope that you will give my proposal your full consideration. I would like to invite the views of individuals and organisations on this proposal and these will be considered to inform the drafting of my bill. Finally, I would like to thank you for your time.

Helen S Eadie MSP  
Dunfermline East

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<sup>1</sup> <http://www.scottish.parliament.uk/business/petitions/docs/PE343.htm>

<sup>2</sup> STEWARDSHIP AND RESPONSIBILITY: A Policy Framework for Private Housing in Scotland, March 2003. Available at: <http://www.scotland.gov.uk/Publications/2003/03/16686/19494>

## 2. INTRODUCTION

1. Helen Eadie MSP (Dunfermline East) has lodged a draft proposal for a bill which seeks to provide additional contractual protection for buyers of new-build houses.

Draft proposal for a Bill to provide additional contractual protection for buyers of new-build houses. (lodged 26 March 2007).

2. Contracts used in the sale of new-build properties in Scotland generally do not afford buyers the same protection as those who buy existing properties.
3. My main concern is that when you buy a new-build home from a developer or builder the date of entry to the property is not fixed, unlike when buying existing properties. Developers can alter the entry date at any time without negotiation with the buyer. This is because generally builders' missives<sup>3</sup> for new-build homes do not specify a date of entry but tie the entry date to the actual date of completion of the property. If you want to buy the property you agree the contract of sale as presented to you by the developer (i.e. with no room for negotiation over the terms of contract) otherwise the property is re-marketed and you lose your original reservation fee<sup>4</sup> and/or any deposit paid.<sup>5</sup>
4. When building dates are missed the developer simply moves the entry date to meet the revised building schedule. This can lead to buyers incurring what at times can be substantial expenses in re-arranging their current financial and living arrangements to meet the changed entry date. In some cases buyers have to move into rented accommodation having sold their homes to meet the initial date of entry. They may have to put their furniture into storage, adding to their costs. Developers and builders offer no reimbursement of expenses and it is difficult to withdraw from the contract as the buyer would lose any reservation fee and deposit on the property and may also be subject to a financial penalty for pulling out.
5. That is why I am proposing a Member's Bill that will require developers of new-build homes to adhere to specific, achievable, agreed entry dates with their buyers. The Bill will require developers of new-build homes to meet the agreed entry date or be financially penalised, placing the buyer and seller on an equal footing.
6. A voluntary solution to this problem has been sought by relevant bodies for a number of years with no success. Because of this failure to agree a voluntarily solution I am left with no option but to legislate to ensure that

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<sup>3</sup> 'Missives' is the Scottish legal term for the contract that exists between the buyer and the seller of a house. The missive is a series of letters exchanged between the respective solicitors negotiating the details of the property sale. Once agreement is reached by both parties the missives are then said to be 'concluded' and the agreed terms become a legally binding contract between the buyer and the seller.

<sup>4</sup> Reservation fee is money paid to reserve a specific plot.

<sup>5</sup> The deposit can be up to 10% of the property value.

both developers and prospective new-build buyers have an equal balance of rights in relation to entry dates.

7. By legislating, I will also redress the balance between buyers of new-build properties and buyers of existing properties to ensure fairness across the property market for all regarding entry dates.
8. After reading this consultation paper I invite you to help shape my Bill by providing answers to some questions. In particular I would like your views on reimbursement of buyers expenses resulting from missed entry dates and whether compensation should be available to buyers over and above expenses. I would like to take this opportunity to thank you in advance for taking the time to respond.

### **3. BACKGROUND**

9. The purchase of property in Scotland, whether new or existing, is governed by the property law and by common contract law.

#### **Date of entry**

10. Historically property changed hands on Whitsunday (15 May) and Martinmas (11 November), but for a long time it has been the practice for buyers and sellers to agree some other mutually suitable date. Where however there was no date specified the date was to be interpreted under section 28 of The Conveyancing (Scotland) Act 1874 (c.94) as the first Whitsunday or Martinmas after the date of conveyance.
11. In 1988 Lord Clyde gave an opinion in a case<sup>6</sup> concerning entry dates. He said that it is not essential to specify a date of entry in missives for the validity and enforceability of a contract for the sale of land. As the law stands therefore builders and developers need not include an entry date in the missives of the properties they are selling, on the other hand it is also recognised “that as a rule of good practice rather than law [the date of entry] should be specified to avoid dispute”.<sup>7</sup>

#### **Buying a property in Scotland**

12. In considering this consultation it is helpful to understand the buying process in Scotland. Differences exist in practice between buyers purchasing an existing private dwelling and buyers of new-build homes who buy from developers and builders as outlined below.

##### *Buying an existing property*

13. Currently when you buy an existing property there are usually several prospective buyers interested in the same property. Normally sellers set an ‘offers-over’ price, set a closing date and sealed bids are offered for the

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<sup>6</sup> Gordon District Council v Wimpey Homes Holdings Ltd 1988, Scots Law Times 481

<sup>7</sup> The Laws of Scotland, Stair Memorial Encyclopaedia, Volume 20, Sale and Exchange, para 913, Date of entry.

property via a solicitor. Usually the highest bid is successful but sometimes a prospective buyer giving an indication of their expected date of entry to the property can sway the seller's decision to accept one bid over another.

14. Once the bid has been successful the missives, including an entry date, are exchanged by solicitors.
15. Missives are typically drafted in such a way that if that entry date is breached for any reason, by either party, a financial penalty clause applies (this is agreed by both parties in advance in the missive). This protects both parties, in relation to any costs incurred by any delay in meeting that entry date. This is a balanced contract where both the buyer and the seller have equal legal rights throughout the whole process.

### *Buying a new-build home*

16. For the sale of a new-build home there is an 'offer to sell' by the property developer whereas with an existing property there is an 'offer to buy' from the purchaser. Usually new-build homes are sold at fixed prices and the 'offers over' system does not apply. Normally at this stage the property is not built and to secure the home prospective buyers pay a non-returnable reservation fee to the developer or builder to secure a plot.
17. Missives on new-build properties are usually completed at an early stage in the buying process, in most cases the missive is concluded 14 days after the reservation fee has been paid and before the property has been built. At this time developers may require payment of a deposit. Once a buyer of a new-build home signs their missives they become liable for the full balance of the property (minus any deposit or reservation fee) within a short period<sup>8</sup> of the developers informing them that the property is fit for occupation. This is because most builders' missives simply define the date of entry as being a certain number of days after the date that the property has been granted a Completion Certificate by the local authority.
18. If payment has not been received by the agreed date the missives are usually drafted in such a way that the developer has the right to rescind (withdraw from) the contract after fourteen days. They can then charge the buyer interest on the purchase price and any other expenses they incur until the property is resold. This money is taken from the reservation fee and /or any deposit the buyer paid.
19. No equivalent solution is available to the buyers as the absence of a stated date of entry means the builder or the developer is not in breach of contract and therefore buyers are not able to recover expenses.

### **Voluntary solution**

20. The Housing Improvement Task Force (HITF) was established by the Scottish Executive in December 2000 to consider specific housing issues. One of the areas highlighted as requiring further consideration was delays

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<sup>8</sup> The exact period would be set out in the missives.

in completion of property. The Task Force recommended that “the Scottish Executive should undertake a specific review of this matter with the aim, if possible, of brokering an agreement that might be required between various parties”.<sup>9</sup> In respect of existing properties standardised missives have been introduced, however the same progress has not been made with missives for new-build homes.

#### *Existing properties*

21. Many solicitors in Scottish cities such as Edinburgh, Aberdeen and Glasgow are being encouraged to use a standard missive<sup>10</sup> for buying existing properties to help speed up the process and make it more straightforward. The Law Society of Scotland says “*The Society fully supports the standard missive initiatives of faculties throughout the country. There are real and obvious benefits to the public and the profession in the standardisation of missives and the Society has attempted a formal standardisation project on at least two occasions over the past 20 years*”. The use of the standard missive is on a voluntary basis and each solicitor has the option to use it or not. This standard missive includes a fixed entry date.

#### *New-build properties*

22. Although great effort has been made by interested parties over a period of years in respect of new-build properties, a voluntary solution has not been reached. Indeed in 2004 the Law Society of Scotland and Homes for Scotland<sup>11</sup> proposed a draft standard missive for new-build properties but it was never put into practice.

23. That proposed standard missive did not however include a fixed entry date. Instead the entry date was tied to 14 days after: the property is physically complete; the local authority grants the habitation certificate; or when the developer provides the New-home Warranty cover note - which ever is the latest.

24. The standard missive proposed that the buyer could pull out of the contract if the date of entry did not occur 90 days from the build date (the date the developer anticipates the property being completed) in these circumstances either party could rescind from the contract without penalty. If the buyer chose to withdraw the developer would refund the purchasers reservation fee and/or deposit without interest being payable.

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<sup>9</sup> *Stewardship and Responsibility: A Policy Framework for Private Housing in Scotland*, The Final Report and Recommendations of the Housing Improvement Task Force, Recommendation 43, March 2003

<sup>10</sup> [http://www.lawscot.org.uk/Members\\_Information/convey\\_essens/stdmissives/](http://www.lawscot.org.uk/Members_Information/convey_essens/stdmissives/)

<sup>11</sup> Homes for Scotland was formed in 2001 and is the representative membership body for the home building and residential developmental industry in Scotland. Its member companies provide 95% of all new homes in Scotland.

#### **4. PROBLEMS ARISING FROM THE CURRENT SYSTEM**

25. Projected entry dates are set by the developers. Buyers are totally reliant on developers meeting these dates. As buyers are liable for the balance of the sale price within a short period of the date the developer notifies them it is fit for habitation many will have sold their own property in anticipation of the entry date and to ensure they have the funds available to make payment.
26. However, when developers fail to complete properties on schedule they often push back the proposed date of entry from anything from a few weeks to 18 months. There are no contractual penalties on developers for doing this, nor do they have to compensate the buyers in any way.
27. At this same stage the buyer cannot rescind (withdraw from) from the contract without losing their reservation fee or deposit. They would also become liable for any costs incurred by the developer in trying to resell the property.

##### **Expenses incurred when entry dates missed**

28. Buyers sell their properties in good faith but end up bearing the brunt of extra costs incurred when the developer fails to meet the entry date. Buyers are penalised financially through no fault of their own. Examples of such costs are shown below.

##### *Storage costs*

29. Storage costs for furniture in secure storage units until buyers can gain entry to their property are in the region of £100 per week. Taking for an example a delay of 3 months could cost buyers £1,200.

##### *Removal cost*

30. When a buyer is forced into the situation of having to store their furniture, they pay for two sets of removal fees:
- From their original home to a storage unit;
  - From the storage unit to the new property.

31. This can increase their removal bill perhaps by some £350 to £450.

##### *Loss of profit on current property*

32. A great deal of pressure is placed on buyers to sell their homes quickly to have the free funds available to purchase their new-build home. Buyers being forced to sell their homes to meet an unrealistic entry date lose out financially.
33. Some people opt for a fixed sale price for their current property as the date of entry for their new property looms closer only to find out too late that the date of entry has been moved. This misses any opportunity to sell their property for perhaps a higher price using the offers over system.

34. Others find themselves in the situation where having sold their house their entry date has been moved by over six months. In that period the value of their old property could have increased considerably by the time their new property is ready. This situation is reinforced by one buyer who after selling their home had their entry date pushed back for over 12 months. Their selling agent confirmed that the price obtained for the property would have been much higher if it had been sold later.

#### *Accommodation*

35. Having sold buyers can find it very difficult to rent temporary accommodation while they wait for their new-home to be built. It is difficult to rent a property for less than a six month period and bed and breakfast establishments are unwilling to take on long term leases. If the buyer was lucky enough to find rented accommodation this could range from £400 per month for an unfurnished 3 bedroom house to £600 per month for similar furnished accommodation.
36. There is a variation in rental fee levels throughout Scotland. Rental fees will be much higher for property in any of the larger cities in Scotland, for example, in Edinburgh costs are more likely to be anything from £600 up to £1,000 per calendar month to rent a 3 bedroom property.
37. For those not able to secure rented accommodation the only alternative may be hotel accommodation. In one example the buyers ended up staying in budget hotels costing between £40 and £50 per night. Unfortunately because of prior bookings they had to move every few days. Additional meal expenses were incurred of around £10 - £15 per day plus the petrol costs from driving from one hotel to another. Using this as an example the minimum expenditure could exceed £1,500 per month.

#### *Additional legal costs*

38. Buyers can incur extra legal costs by having to involve lawyers to chase the developer for an entry date. Buyers end up shouldering the extra financial burden of directing their lawyers to contact developers about entry dates.

#### *Mortgages*

39. Buyers arrange mortgages in advance of the purchase with lenders so that the final balance is available on the proposed entry date. In most cases buyers have shopped around to secure the best rate available to them. However these deals are only available if the mortgage is completed (i.e. money passed to the seller) within a certain period, for example 3 months. If the entry date is moved significantly, and the deal period expires, the buyer has to secure another mortgage deal which may or may not be at the same competitive rate.

40. As you see costs start escalating for the buyer. The table below shows how costs can accrue over a 12 month period.

<b>COSTS</b>	<b>1 month £</b>	<b>3 months £</b>	<b>6 months £</b>	<b>12 months £</b>
Storage costs	400	1,200	2,400	4,800
Removal costs	400	400	400	400
Rental costs	*500	*1,500	*3,000	*6,000
Hotel/meals	**1,610	**4,830	**9,660	N/A
<b>Total inc. rental option</b>	<b>1,300</b>	<b>3,100</b>	<b>5,800</b>	<b>11,200</b>
<b>Total Inc. hotel option</b>	<b>2,410</b>	<b>6,430</b>	<b>12,460</b>	<b>N/A</b>

\* Figures used are the average cost of unfurnished and furnished rental income - £500

\*\* Hotel room at £45 per night and food £12.50

41. As you can see, from the above table, costs incurred by the buyer are substantial. Developers missing the entry date by just one month can cost a buyer £1,300 in extra expenses. If the entry date is pushed back by 12 months the costs can escalate to a staggering £11,200. Remember, because the developer has not fixed an entry date the buyer has no right to claim these costs back from the developer.

### **Stress and inconvenience caused by missed entry dates**

42. When a move goes wrong due to developers missing the entry date it adds to stress levels for the buyer. Graham Millar, Chairman of the Scottish Consumer Council said *"Moving home is regarded as one of the most stressful experiences anyone can go through"*<sup>12</sup> Imagine how you would feel if you had young children or were working to a tight budget and were left homeless through no fault of your own.

43. Perhaps one of the main groups affected by this problem are buyers with children. The inconvenience and disruption to family life of having to move to temporary accommodation, or in the case where it is difficult to rent a property - keep moving; can have dramatic implications for children. In some instances children have to move to different catchment areas

<sup>6</sup> <http://www.scotconsumer.org.uk/pressinfo/documents/pr04move.pdf>

necessitating a change of school or a lengthy journey to remain at their original school, disrupting their education and potentially affecting their development. Younger children may need to have different childcare arrangements put in place.

44. The emotional impact of a missed entry date is difficult to encapsulate in this paper. The example referred to above gives some sense of the potential effect on families, however just the strain of dealing with ever mounting costs and the uncertainty of when you can start your life in your new property can have huge emotional consequences for individuals. Typically missives are drafted in such a way that buyers are not able to claim compensation for stress and inconvenience caused from a missed entry date under the existing system.

## 5. DETAILS OF THE PROPOSAL

45. There is nothing in place to routinely protect purchasers of new-build homes in relation to entry dates. Indeed new-build home buyers may find that they have more protection when buying white goods costing £300 than they do when buying a home. This is because white goods are covered by consumer protection legislation which provides the consumer with statutory rights.
46. Buying a home is the biggest single purchase most of us will make in our lives. It is beyond understanding why there is still no protection for buyers investing such large sums of money, bearing in mind that the average house price in Scotland as at September 2006 was £142,355<sup>13</sup>. This figure is just over 12% more than the average price at the end of 2005<sup>14</sup>. House prices in Scotland are rapidly increasing and the lack of protection available for buyers of new-build properties will only worsen if a solution is not put in place as soon as possible.
47. In a press release by smartnewhomes they claim that Scotland could become the second most expensive place to buy a new-home in 2007. Demand for new-homes is outstripping supply and developers will continue to be in the stronger position to dictate the terms of missives. They add *“The new-homes market in Scotland has proved to be one of the real hotspots of 2006, with rapidly growing prices that now rival those traditionally exclusive to the south of England”*<sup>15</sup>.
48. All buyers deserve to be on an equal legal footing with the seller or developer - in the case of new-build properties they are not. My proposal will provide statutory protection for buyers of new-build property.

### Entry date

49. The bill will require all builders and developers to specify an achievable and realistic entry date in the missive of every new-build property.
50. The standard missive model proposed elsewhere does not address buyers concerns about missed entry dates as the model ties entry to various stages of completion. I am aware that developers will argue that conditions on building sites are often out-with their control and these could affect entry dates e.g. weather conditions or being let down by a supplier. I believe however that the developer should build in appropriate time to take account of possible delays. This essentially is a project management issue. Many other types of businesses, such as those in the manufacturing industry face this kind of problem where deadlines have to be met or financial penalties arise. By including an achievable and realistic entry date in new-build missives, I believe buyers will have certainty in respect of entry to their property and have confidence that any

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<sup>13</sup> [http://news.bbc.co.uk/1/shared/spl/hi/in\\_depth/uk\\_house\\_prices/regions/html/region12.stm](http://news.bbc.co.uk/1/shared/spl/hi/in_depth/uk_house_prices/regions/html/region12.stm)

<sup>14</sup> Registers of Scotland statistics

<sup>15</sup> [http://www.smartnewhomes.com/content/Press\\_Centre/1889/Scotland\\_Now\\_Ranked\\_Number\\_Three\\_In\\_New\\_Build\\_League\\_Table.aspx](http://www.smartnewhomes.com/content/Press_Centre/1889/Scotland_Now_Ranked_Number_Three_In_New_Build_League_Table.aspx)

financial and personal arrangements they've put in place are sufficient for the move. The benefit to developers and builders will be that their reputations will be improved and less business time will be taken up dealing with complaints regarding entry dates.

**Question 1: What are the advantages/disadvantages of requiring a stated day for entry in the missives of new-build homes?**

**Rescission of the contract**

51. My bill will make it possible for buyers who have had their entry dates missed by developers to withdraw of the contract of sale without penalty.
52. The draft standard missive sets out that if the developer did not meet the entry date within 90 days from the build date (anticipated date of entry) then either party could rescind from the contract without penalty. This provides protection to the developer from any unforeseen delays to the anticipated build date. Conversely, this means that a buyer has to face a possible 3 months without access to their property and endure any financial burden incurred as a result of this delay.
53. In essence, the draft standard missive gives a builder a 90 days leeway requiring purchasers to wait 90 days before being able to rescind (withdraw) from the sale without penalties. Normally, in contract law the defaulting party is given some time to perform the obligation, in this case handing over the property. This can however be overridden by the missives by stipulating that time is of the essence and so the right to rescind emerges immediately the developer defaults. This allows purchasers to pull out of the contract before incurring any further costs and enables the developer to remarket the property immediately.
54. Alternatively, a period could be specified, such as 14 days, after which the purchaser can rescind if the developer has not handed over the property. My preference is to stipulate that the option to rescind arises immediately the developer fails to meet the completion date. I consider that this sends a clear message that entry dates have to be achievable and realistic. However, I would like to gather views on whether the right balance has been struck.

**Question 2: How long should a buyer have to wait before they have the right to rescind the contract? Please explain the reasons in support of your answer.**

**Reimbursement of Expenses**

55. When developers currently miss completion dates they are not required to meet buyer's expenses. At best if the buyer is able to withdraw from the contract they may be refunded their deposit without interest, but will almost certainly lose their reservation fee.

56. My proposal will ensure that when a buyer pulls out of the contract because an entry date has not been adhered to all fees and deposits are repaid in full along with interest charged at four per cent above Bank of Scotland interest rate. This rate has been chosen because it corresponds to the interest rate charged by developers when purchasers default on the sale contract i.e. purchasers are late with the full payment. This element of my proposal reinstates the contractual balance between the developer and the purchaser.

57. Over and above this I am convinced that where the developer defaults on a fixed entry date the onus should be on developers to pay buyers reasonable expenses. With regard to what constitutes reasonable expenses, I believe the purchaser should have a duty to take steps to minimise their losses and be in a position to prove their expenditure.

**Question 3: What are the advantages/disadvantages of reimbursing buyers expenses incurred as a result of missed entry dates?**

### **Compensation**

58. As I explained earlier in my paper buyers who have not gained access to their new properties as intended suffer stress and inconvenience. Most people regard moving house as one of life's most stressful experiences. Add to this the uncertainty of missed entry dates and you can only imagine the emotional strain on individuals and families. As such I would like to investigate whether developers should pay compensation for emotional distress caused to buyers as well as reimbursing expenses when entry dates are not met. I have no firm view on this matter and look to you and your responses for guidance. You may wish to provide some indication of how much compensation should be available and in what circumstances.

**Question 4: What are the merits/disadvantages of entitling buyers to compensation and in what circumstances should it be payable?**

## **6. CONCLUSION AND HOW TO RESPOND**

59. I have endeavoured to cover the main areas associated with legislating to specify a fixed entry date in missives for new-build homes. There may be other issues that require to be addressed or other matters that you think should be considered in relation to the proposed Bill.

**Question 5: Are there any equal opportunities implications that arise from my proposal?**

**Question 6: Do you have any other comments or views on what I propose?**

60. Thank you for taking the time to read this consultation paper. You are now invited to respond by answering the questions set out in this document and to make any other comments that you may consider relevant. Responses should be submitted by 15 August 2007 and may be sent to:

Helen Eadie MSP  
25 Church Street  
Inverkeithing  
KY11 1LG

61. If you would like to submit your response electronically you can do so by e-mailing: [helen@eadie.new.labour.org.uk](mailto:helen@eadie.new.labour.org.uk)

62. Copies of the paper or alternative formats can be requested using the contact details above and [calls via Typetalk are welcome]. An on-line copy is available on the Scottish Parliament's website and on the following webpage: [www.fifelabour.org.uk](http://www.fifelabour.org.uk)

### **Confidential Responses**

63. Under the Code of Practice on open government, responses will be made available to the public, unless you ask for your comments to remain confidential.

64. To help inform debate on the matters covered by this paper and in the interests of openness, the responses submitted on this consultation document will be made public. It will be assumed that responses can be made public unless you indicate that your response is confidential.

65. Confidential responses will nevertheless be included in any summary of statistical analysis, which does not identify individual responses.

66. Finally please feel free to pass this paper on to other individuals and organisations who you think might be interested in participating in the consultation process.

## **7. QUESTIONS**

**Q1 What are the advantages/disadvantages of requiring a stated day for entry in the missives of new-build homes?**

**Q2 How long should a buyer have to wait before they have the right to rescind the contract? Please explain the reasons in support of your answer?**

**Q3 What are the advantages/disadvantages of reimbursing buyers expenses incurred as a result of missed entry dates?**

**Q4 What are the merits/disadvantages of entitling buyers to compensation and in what circumstances should it be payable?**

**Q5 Are there any equal opportunities implications that arise from my proposal?**

**Q6 Do you have any other comments or views on what I propose?**